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NEWSLETTER

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Partnership losses: If a partner is injured in a motor vehicle accident the resulting losses are shared between the partners in terms of the partnership agreement. It seems that only the injured partner has a right of action and then only for his share of the losses. Notwithstanding that the other partners suffer loss by reason of their partnership profit sharing arrangements, they have no right of action. This is so for the same reasons that an employer has no right of action for the losses he suffers from having to continue to pay an injured employee's salary by way of sick pay (*Union Government v Ocean Accident & Guarantee Corp* 1956 1 SA 577 (A)). There is, of course, no reason why a partnership agreement should not be worded so that the losses of an injured partner with a claim against the RAF are not shared by the other partners.

State welfare benefits and the means test: During the long penniless days that a claimant has to endure between injury and payment of compensation, many claimants make successful application for a State disability grant. This is presently R9840 per year and will be increased R10440 per year from April 2007. The grant is subject to a means test: If the claimant receives compensation in excess of 30 times the annual grant, that is to say R313200 after 1 April 2007, he will cease to be entitled to his grant and payment thereof should cease. In many instances the RAF claims handler takes care to notify the appropriate Government department. However, the means test has regard to the money actually received by the claimant. Thus if the award was R500000, but the claimant only gets R280000 after deduction of legal fees of R220000 then the grant will continue to be paid. This raises an assessment conundrum because the usual logic of assessment says that we must pretend that there are no legal costs to be born by a successful claimant. It seems that a defendant is not entitled to argue for deduction of a continuing State disability grant on the grounds that the plaintiff's attorney will be making a substantial deduction for costs?

In the course of time the award will in any event be consumed and at some stage the claimant will once again become entitled to his disability grant. This event will be accelerated by Government's commendable practice to escalate the grant each year to offset inflation (unlike Namibia which has not increased its grant payments for many years, and Tanzania which does not pay a grant at all).

The means test makes provision for a reduced disability grant for persons who have some capital, but not the full 30x the annual grant (R313200). This consideration seriously complicates actuarial calculations aimed at calculating a present value for the deduction from loss of earnings.

The best solution is that Government removes the means test for persons who are certified to have received accident compensation from the RAF. The full grant payable to age 65 (60 for women) is then deductible when assessing compensation for loss of earnings.

Corrigendum: Newsletter 63 for September 2006 mentions the ruling in *Winston v RAF*. The claimant, however, was not a Mr Winston but a Mr EW Twala and the correct reference is *Twala v RAF* (unreported 08/2006 case 01/15178 (T).

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General contingencies - some historical tidbits: The adjustment for general contingencies enables the court to give expression to its overall feelings about the basic actuarial calculation. Few texts communicate the nature of general contingencies more vividly than the English judgments which first introduced it as an explicit adjustment:

> `She had lost an annuity for the joint lives of herself and her son... The value of the annuity spoken to in the evidence was the value of an annuity on government or other very good security, and that the annuity lost was that secured by the personal security of the deceased and, therefore, of much less value' (*Rowley v London & NW Rail* [1861-73] All ER Rep 823 (Exch) 828).

> `When the Fatal Accidents Act, 1846, was passed, it was thought for a short time by some that damages might be given "to the full extent of a perfect compensation"... "It would be most unjust" (however) "if whenever an accident occurs, juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done"' (*Rowley v London & NW Rail* [1861-73] All ER Rep 823 (Exch) 829-30).

> `A thousand circumstances might have prevented him from making that income if he had remained well, and the accident had not happened... the jury would be wrong if they did not consider those circumstances as upon the doctrine of chances' (*Phillips v London & SW Rail* [1874-80] All ER Rep 1176 (CA) 1180-1).

In Roman-Dutch times the adjustment was introduced by an implicit scaling down of the annual amount of loss and the number of years' duration: `Since proof of damage is difficult, the judge should in doubtful cases adopt the course most favourable to the defendant and award low damages rather than high damages'(Erasmus 1975 *THRHR* 268 269inf. D50.17.125 `*Favorabiliores rei potius quam actores habentur*' cited in *Bay Passenger Transport v Franzen* 1975 1 SA 269 (A) 274H). Likewise modern English practice is to disregard explicit actuarial calculations and to work with a "gut-feel multiplier" inclusive of the parties' intuitive judgment as regards general contingencies.

Inflation "oops?": In *Seymour v Minister of Safety and Security* 2006 5 SA 495 (W) at 499E/F it was said that:

> "In (*May v Union Government* 1954 3 SA 120 (N)) an advocate was wrongly arrested and detained for a few hours. Broome JP awarded the plaintiff £1000. This amount would be worth in the order of R350000 to R400000 today".

The learned judge does not disclose how he went about adjusting £1000 for inflation to February 2005, the date of his judgment, but a quick look at the *Quantum Yearbook* 2005 at page 51 would have revealed that the original award of £1000 was the equivalent of R113000 at February 2005. The Court then went on to award damages of R500000. The impression is that the Court overadjusted for inflation and made an award some three times greater than was justified, this award to be paid out of taxpayer's money. However, considering the indignation expressed by the learned judge, and his emphasis on how the values and circumstances of society have changed with the passage of time, he may well have awarded R500000 even if he had been aware of the correct adjustment for inflation.

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